IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 23RD FEBRUARY 2007 / 4TH PHALGUNA 1928

RSA.No. 619 of 2006()

O.S.489/98 OF II ADDL.MUNSIFF COURT, NEYYATTINKARA
A.S.86/2000 OF SUB COURT, NEYYATTINKARA

APPELLANTS/APPELLANTS/PLAINTIFFS 2 TO 6:
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1. G. RAJENDRAN,
   RESIDING AT PARAKKUZHI PUTHEN VEEDU,
   THALAYAL DESOM, ATHIYANNOOR VILLAGE.

2. D. SOBHANA,
   RESIDING AT PARAKKUZHI PUTHEN VEEDU,
   THALAYAL DESOM, ATHIYANNOOR VILLAGE.

3. D. JAYAKUMARI,
   RESIDING AT PARAKKUZHI PUTHEN VEEDU,
   THALAYAL DESOM, ATHIYANNOOR VILLAGE.

4. G. VIJAYACHANDRAN,
   RESIDING AT PARAKKUZHI PUTHEN VEEDU,
   THALAYAL DESOM, ATHIYANNOOR VILLAGE.

5. D. VINEETHA,
   RESIDING AT PARAKKUZHI PUTHEN VEEDU,
   THALAYAL DESOM, ATHIYANNOOR VILLAGE.

BY ADV. SRI.R.S.KALKURA

RESPONDENTS: RESPONDENT/DEFENDANT:

K. KRISHNAN,
AT TEASHOP-CUM RESIDING AT ARASUMOODU JUNCTION,
ARUMANOOR DESOM, POOVAR P.O. FROM PUTHUMONKAVU
VEEDU, ARUMANOOR.

BY //

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 23/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON I.A.NO. 1645/06 IN RSA 619/06

DISMISSED

23/2/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

R.S.A .NO. 619 OF 2006

Dated 23rd February 2007

J U D G M E N T

Plaintiffs in O.S.489/98 on the file of Additional Munsiff court, Neyyattinkara are appellants. Respondent was the defendant. Appellants instituted the suit seeking decree of declaration of their title and injunction. Case of appellants was that plaint schedule property belonged to Raman Kesavan their grandfather who mortgaged the property in favour of Chellamma Devaki their mother as per Ext.A1 mortgage and on their death it devolved on appellants and Jayachandran their brother and the mortgage is now irredeemable and they are residing away from the property and respondent is attempting to trespass into the property and respondent has no manner of right or possession and therefore appellants are entitled to get decree for declaration of title and injunction. Respondent in his written statement contended that property did not belong to Kesavan and it originally belonged to Parvathy Ummini and Pachan

Theivan who under Ext.B9 lease deed granted a lease to Ummini Gopalan who later assigned it to Krishnan Narayanan who in turn assigned it under Ext.B1 to respondent and respondent assigned 2 cents of that property to one Sugathan and appellants are not entitled to the decree sought for. Learned Munsiff framed the necessary issues. On the evidence of PW1, DW1 and Exts.A1 to A7, B1 to B16 and C1, learned Munsiff though rejected the case of respondent he has title to the property under Ext.B9, held that under Ext.A2 the property belonged to Kesavan and Chellappan and Chellappan assigned his right to Chellamma the mother of respondent and on her death it devolved on respondent as one of her legal heirs and therefore appellants are not entitled to the decree for declaration sought for. Appellants challenged decree and judgment before Sub court, Neyyattinkara in A.S.86/2000. Learned Sub Judge after re-appreciation of evidence confirmed the decree and dismissed the appeal. Learned Sub Judge additionally found that appellants are barred by principles of estoppel in view of Ext.B6 judgment in the earlier suit filed against Raman Kesavan. The concurrent decree and judgments are challenged in this second appeal.

2. Learned counsel appearing for appellants was

heard.

3. Argument of learned counsel appearing for appellants was that both the courts below having found that case of respondent that plaint schedule property was obtained by Ummini Gopalan under Ext.B9 lease deed is not correct and respondent has no right over the property under Ext.B9, Exts.B4 and B1, the right, title and possession of appellants should have been upheld and the decree should have been granted. It was also argued that in any case when courts below found that under Ext.A2, right of Raman Kesavan vestd with appellants, courts below should not have dismissed the suit and instead should have declared the right of fractional right of appellants to the plaint schedule property.

4. On hearing learned counsel appearing for appellants, I do not find any substantial question of law involved in the appeal. Suit was filed for declaration of title. Title set up is under Exts.A1 and A2. Ext.A1 is mortgage created by Raman Kesavan in favour of his daughter Chellamma Devaki. The right of Kesavan the mortgagor is under Ext.A2. But under Ext.A2 Kesavan has only a fractional right along with Chellappan. The right of Chellappan is therefore unaffected by Ext.A1 mortgagor Chellappan assigned his right in favour of

Chellamma. On the death of Chellamma her right would definitely devolve on her legal heirs including respondent. Therefore respondent is having a fractional share in the property. Appellants could only claim the fractional share. Though it was argued that fractional right of appellants should have been declared and a lesser relief could have been granted even without a specific prayer, without impleading all legal heirs of Chellamma, appellants are not entitled to a decree for declaration of fractional share in the suit. Even though under Ext.B6, Ext.B9 set up by respondents was not upheld, Ext.B6 establish that respondent, even at the time of Ext.B6 suit had asserted possession of plaint schedule property and that suit was also ultimately dismissed. In such circumstances, I do not find any reason to interfere with the concurrent findings of courts below.

5. Appeal is dismissed in limine. It is made clear that the dismissal of the suit will not effect the right of appellants to work out their remedy by appropriate proceedings.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.